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## "Because Ladies Lie": Eliminating Vestiges of the Corroboration and Resistance Requirements from Ohio's Sexual Offenses

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## "Because Ladies Lie": Eliminating Vestiges of the Corroboration and Resistance Requirements from Ohio's Sexual Offenses

### Erratum

The article at 62 CLEV. ST. L. REV. 343 contained the following errors: The footnote text of footnote 12 was isolated. The footnote number appeared on one page, but the text appeared on the next page, by itself. Footnote 75 cross-referenced footnote 52, when it should have cross-referenced footnote 51. The first paragraph of the conclusion, beginning on page 368 with the words "The marital rape exemption" was a quote from Michelle J. Andeson, *Diminishing the Legal Impact of Negative Social Attitudes Toward Acquaintance Rape Victims*, 13 NEW CRIM. L. REV. 644 (2010), but was not indicated by either block indentation or quotation marks. The word "diminishing" was misspelled in footnote 156. These errors were due to mistakes in the editorial process and were not the product of the author. The editors apologize for these errors. Erratum notice is at [Volume 63, Issue 1](#).

# “BECAUSE LADIES LIE”<sup>1</sup>: ELIMINATING VESTIGES OF THE CORROBORATION AND RESISTANCE REQUIREMENTS FROM OHIO’S SEXUAL OFFENSES

PATRICIA J. FALK\*

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<sup>1</sup> According to Deborah Denno, *Commentary Symposium: Model Penal Code Second: Good or Bad Idea?: Why the Model Penal Code’s Sexual Offense Provisions Should be Pulled and Replaced*, 1 OHIO ST. J. CRIM. L. 207, 216 (2003):

Morris Ploscowe, one of the [Model Penal] Code's most renowned reporters, became a symbol of some of the more sexist attitudes spanning these decades [the 1950s, 1960s, and the 1970s] by virtue of his writings and proclamations. Although Ploscowe asserted a number of inflammatory remarks, perhaps his most remembered are those pertaining to the reasons for having a corroboration requirement for rape (as opposed to other crimes). According to Ploscowe, corroboration was important because when it comes to rape, “ladies lie.” Ploscowe never successfully shed the repercussions of making this statement, which was even highlighted in his *New York Times* obituary.

(footnotes omitted); *see also* William M. Freeman, *Ex-Magistrate Ploscowe Dies; Criminal-Law Expert Was 71*, N.Y. TIMES, Sep. 22, 1975, at 36; Lesley Oelsner, *Law of Rape: “Because Ladies Lie”*, N.Y. TIMES, May 14, 1972, at E5 (discussing 1972 change in New York law lessening, but not completely eliminating, the corroboration requirement in rape statute.).

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“[I]f the witness be of good fame, if she presently discovered the offense and made pursuit after the offender, showed circumstances and signs of the injury, . . . ; these and the like are concurring evidences to give greater probability to her testimony, when proved by others as well as herself.”<sup>2</sup>

“Traditionally, the law has done more than reflect the restrictive and sexist views of our society; it has legitimized and contributed to them. In the same way, a law that rejected those views and respected female autonomy might do more than reflect the changes in our society; it might even push them forward a bit.”<sup>3</sup>

#### I. INTRODUCTION

Throughout the history of rape law, victims of sexual assault have been subjected to many unique substantive and procedural obstacles adversely affecting the successful prosecution of their attackers. Among these were the corroboration and resistance requirements, which shared at their core an inherent distrust of female

<sup>2</sup> 1 MATTHEW HALE, *HISTORIA PLACITORUM CORNAE, THE HISTORY OF THE PLEAS OF THE CROWN* 633 (2003) (originally published in 1736). For a contemporary example of a corroboration requirement in action, see Meredith Bennett-Smith, *Norfolk Police Rape Policy Deemed Reports 'Unfounded,' But Outrage Forces Change*, HUFFINGTON POST, Aug. 14, 2013.

<sup>3</sup> Susan Estrich, *Rape*, 95 *YALE L.J.* 1087, 1093-94 (1986).

rape complainants.<sup>4</sup> Under the former, no prosecution could proceed absent corroborating evidence; the victim’s testimony alone would not suffice.<sup>5</sup> The corroboration requirement exhibited an explicit distrust of female<sup>6</sup> rape victims because no other common law crime had a similar requirement.<sup>7</sup> Under the latter, rape law required victims to demonstrate adequate resistance to the rape or forfeit their right to protection from sexual predators. The resistance requirement was also unique among common law offenses. It demonstrated a tacit distrust of female rape victims because resistance helped to verify nonconsent.<sup>8</sup> Evidence of physical resistance—perhaps of bruises and other injuries—proved that the rape victim was not lying. Almost three centuries ago, Matthew Hale succinctly summarized these notions: “[S]igns of the injury, . . . and the like are concurring evidences to give greater probability to her testimony, when proved by others as well as herself.”<sup>9</sup>

In response to alarming statistics about the dearth of rape cases brought to successful fruition,<sup>10</sup> feminist critiques of rape law,<sup>11</sup> and changing attitudes about sexual autonomy,<sup>12</sup> rape and sexual assault statutes in America have undergone

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<sup>4</sup> Others included the prompt complaint and chastity requirements, the marital exemption, and cautionary jury instructions. WAYNE R. LAFAVE, *CRIMINAL LAW* 893, 922-31 (5th ed. 2010).

<sup>5</sup> See, e.g., MODEL PENAL CODE § 213.6(5) (1962).

<sup>6</sup> Despite the gender neutrality of most modern rape statutes, the vast majority of rape victims are women and the vast majority of perpetrators are men. According to Michael Planty et al., Bureau of Justice Statistics, *Female Victims of Sexual Violence, 1994-2010*, March 2013, 9% of victims are male. The FBI Uniform Crime Reports for 2011 reported that of those arrested for rape, 98.8% were male and 1.1% were female. FED. BUREAU OF INVESTIGATION, *CRIME IN THE UNITED STATES: TABLE 33* (2011), available at <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/tables/table-33>.

<sup>7</sup> LAFAVE, *supra* note 4, at 926-27.

<sup>8</sup> Vivian Berger, *Man’s Trial, Woman’s Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 10 (1977) (“[T]he singularity of the law of rape stems mainly from a deep distrust of the female accuser.”); SUSAN ESTRICH, *REAL RAPE: HOW THE LEGAL SYSTEM VICTIMIZES WOMEN WHO SAY NO* 38-41 (1987) [hereinafter *ESTRICH, REAL RAPE*] (discussing how resistance requirement in rape law was thought necessary to combat a woman’s likelihood of lying).

<sup>9</sup> HALE, *supra* note 2, at 635.

<sup>10</sup> Anon., Note, *The Rape Corroboration Requirement: Repeal Not Reform*, 81 YALE L.J. 1365, 1370 & n.38 (1972) (reporting study of New York City in 1969 where corroboration requirement resulted in only 18 convictions out of 1,085 arrests) (citing Oelsner, *supra* note 1, at § 4, at 5); Berger, *supra* note 8, at 5 (noting low charging and conviction rates for the crime of rape).

<sup>11</sup> See, e.g., SUSAN BROWNMILLER, *AGAINST OUR WILL* (1975); CATHERINE MACKINNON, *FEMINISM UNMODIFIED* (1987); ESTRICH, *REAL RAPE*, *supra* note 8; Stephen J. Schulhofer, *The Feminist Challenge in Criminal Law*, 143 U. PA. L. REV. 2151 (1995); Victoria Nourse, *Symposium on Unfinished Feminist Business: The “Normal” Success and Failures of Feminism and the Criminal Law*, 75 CHI-KENT. L. REV. 951, 964 (2000) (“To write of feminist reform in the criminal law is to write of simultaneous success and failure.”).

<sup>12</sup>

enormous revision during the last few decades.<sup>13</sup> The barriers to successful prosecution of rape cases—including the corroboration and resistance requirements—have been slowly eroding in modern statutory law. Despite rampant rape reform, these old-fashioned requirements have been remarkably persistent, and vestiges of them remain in twenty-first-century statutory enactments.<sup>14</sup>

The Ohio General Assembly has made considerable progress in modernizing the state's rape laws, eliminating many of the substantive and procedural obstacles to the successful prosecution of criminals.<sup>15</sup> Yet, Ohio's contemporary sexual offense provisions include vestiges of both the corroboration and resistance requirements. More specifically, the corroboration requirement (1) still applies to the crime of sexual imposition and (2) is used as a grading factor in gross sexual imposition.<sup>16</sup> The resistance requirement (1) has been eliminated from rape and gross sexual imposition, but not sexual battery and sexual imposition, and (2) the wording of the existing resistance-elimination provisions is legally inaccurate.<sup>17</sup> Finally, (3) resistance language (i.e., "ability to resist") appears in subsections of the rape, gross sexual imposition, and sexual battery statutes, causing confusion about whether physical resistance is required by victims of these offenses.<sup>18</sup>

Part II of this Article provides a brief overview of the four most important sexual offense statutes in Ohio—rape, sexual battery, gross sexual imposition, and sexual imposition—to provide the necessary backdrop for the subsequent analysis.<sup>19</sup> Part III examines the vestiges of the corroboration requirement in Ohio's sexual imposition and gross sexual imposition statutes and analyzes an Ohio Supreme Court opinion directly on point. This Part argues that the remnants of the corroboration requirement should be eliminated as an outmoded expression of victim unreliability in rape law

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Amid the flux of scholarly debate and practical reform, one thing is clear. The law of rape has not ceased and in all likelihood will not cease to evolve. Nor, arguably, should it, for the law of rape, like any body of law—perhaps *more* than other bodies of law—reflects changing social attitudes and conditions, normative as well as material.

KEITH BURGESS-JACKSON, RAPE: A PHILOSOPHICAL INVESTIGATION 43, 82 (1996) (footnote omitted).

<sup>13</sup> LAFAVE, *supra* note 4, at 893-95.

<sup>14</sup> See, e.g., Michelle J. Anderson, *Diminishing the Legal Impact of Negative Social Attitudes Toward Acquaintance Rape Victims*, 13 NEW CRIM. L. REV. 644 (2010) [hereinafter Anderson, *Diminishing*] ("The next generation of rape law reform [will be] to abolish the remnants of the requirements for prompt complaint, corroboration, and cautionary instructions."); Jaye Sitton, Comment, *Old Wine in New Bottles: The Marital Rape Allowance*, 72 N.C. L. REV. 261, 264 (1993) ("Despite the willingness of many states to abolish the marital exemption and the rejection of a marital rape allowance by some others, the issue of marital rape offers stark proof that women still have far to go to achieve full equality.").

<sup>15</sup> For instance, Ohio was one of the first states to "have passed a statute completely relieving the prosecution of the need to show resistance as proof of non-consent." Berger, *supra* note 8, at 11, 11 n.79.

<sup>16</sup> See *infra* notes 44-91 and accompanying text.

<sup>17</sup> See *infra* notes 92-124 and accompanying text.

<sup>18</sup> See *infra* notes 125-62 and accompanying text.

<sup>19</sup> OHIO REV. CODE ANN. §§ 2907.01-.06 (West 2006).

and offers simple statutory reforms to finally rid Ohio’s sexual offenses of any corroboration requirement. Part IV analyzes three problem areas involving the resistance requirement’s persistence in Ohio’s sexual offenses, and proposes statutory modernization reworking the resistance-lifting language, incorporating such language into the sexual battery and sexual imposition statutes, and revamping incapacity provisions to focus on consent, not resistance. The Article concludes by arguing that Ohio’s rape and sexual assault statutes could be substantially modernized without massive legislative reworking. The proposed changes are relatively modest in scope and would be quite easy to enact. The symbolic and real-world consequences of doing so are substantial.<sup>20</sup>

## II. AN OVERVIEW OF OHIO’S SEXUAL OFFENSE PROVISIONS

Ohio’s “Sex Offenses” chapter begins with a definitional section<sup>21</sup> followed by five major offense categories, four of which are relevant to the present analysis:<sup>22</sup> rape,<sup>23</sup> sexual battery,<sup>24</sup> gross sexual imposition,<sup>25</sup> and sexual imposition.<sup>26</sup> Two offenses, rape and sexual battery, prohibit *sexual conduct* (vaginal and anal intercourse, oral sex, and penetration)<sup>27</sup> under specified conditions, e.g., when force

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<sup>20</sup> Vivian Berger asserts:

Rape is probably one of the most under-reported crimes. Reluctance to report serious offenses poses a problem for the criminal justice system in general. Fifty to eighty percent of such crimes may never enter statistical rolls because victims, for reasons ranging from fear of reprisal to belief that nothing will ever be done, fail to make official complaints. Estimates of the actual incidence of rape, however, range from three and one half to twenty times the reported figure! The system’s perceived hostility to the rape complainant, coupled with the singular shame and trauma of sexual assault, may well explain this troubling phenomenon.

Berger, *supra* note 8, at 5 (footnotes omitted).

<sup>21</sup> OHIO REV. CODE ANN. § 2907.01 (West 2006).

<sup>22</sup> Ohio also has a statute criminalizing unlawful sexual conduct with minors that prohibits essentially statutory rape—sexual conduct with a person below the age of legal consent. *Id.* § 2907.04.

<sup>23</sup> *Id.* § 2907.02.

<sup>24</sup> *Id.* § 2907.03.

<sup>25</sup> *Id.* § 2907.05.

<sup>26</sup> *Id.* § 2907.06. Ohio’s sex offense chapter also outlaws other types of conduct, such as importuning and prostitution, see *id.* §§ 2907.07 and 2907.25 respectively, but these are outside the purview of the present analysis.

<sup>27</sup>

“Sexual conduct” means vaginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex; and, without privilege to do so, the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal opening of another. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.

*Id.* § 2907.01(A).

or threat of force is used under rape<sup>28</sup> and when the victim is unaware that the act is being committed under sexual battery.<sup>29</sup> In terms of offense grading, rape is a felony in the first degree with different levels of punishment depending on the circumstances;<sup>30</sup> sexual battery is a felony in the third degree.<sup>31</sup> The other two offenses, gross sexual imposition and sexual imposition, outlaw *sexual contact* (defined as the touching of another's erogenous zones)<sup>32</sup> under different sets of circumstances, e.g., whether the offender used force or administered drugs to the victim. Gross sexual imposition is a felony of the third or fourth degree.<sup>33</sup> Sexual imposition may be a misdemeanor of the first or third degree depending upon the defendant's previous sexual offense convictions.<sup>34</sup>

A considerable degree of parallelism exists between the rape and gross sexual imposition statutes, despite prohibiting different types of sexual activity—sexual conduct and sexual contact—respectively. Although not completely co-extensive,<sup>35</sup> both statutes prohibit sexual conduct or contact accomplished by force,<sup>36</sup> by surreptitious, forcible, or deceptive drugging,<sup>37</sup> with a child under thirteen years old,<sup>38</sup> and with a substantially incapacitated person.<sup>39</sup> A lesser degree of parallelism exists between the sexual battery and sexual imposition statutes. Both outlaw sexual conduct or sexual contact, respectively, when the victim is substantially impaired,<sup>40</sup> unaware that a sexual act is being committed,<sup>41</sup> or when the offender is a mental health professional.<sup>42</sup> The sexual battery and sexual imposition statutes also contain a number of unique provisions not relevant for present purposes.

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<sup>28</sup> *Id.* § 2907.02(A)(2).

<sup>29</sup> *Id.* § 2907.03(A)(3).

<sup>30</sup> *Id.* § 2907.03(B).

<sup>31</sup> *Id.* § 2907.02(B).

<sup>32</sup> “‘Sexual contact’ means any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person.” *Id.* § 2907.01(B).

<sup>33</sup> *Id.* § 2907.05(B).

<sup>34</sup> *Id.* § 2907.06(C).

<sup>35</sup> *See infra* notes 54-58 and accompanying text. The gross sexual imposition statute also has a provision about touching another person's genitalia that is not present in the rape statute. OHIO REV. CODE ANN. § 2907.05(B) (West 2006).

<sup>36</sup> OHIO REV. CODE ANN. §§ 2907.02(A)(2), 2907.05(A)(1) (West 2006).

<sup>37</sup> *Id.* §§ 2907.02(A)(1)(a), 2907.05(A)(2).

<sup>38</sup> *Id.* §§ 2907.02(A)(1)(b), 2907.05(A)(4).

<sup>39</sup> *Id.* §§ 2907.02(A)(1)(c), 2907.05(A)(5).

<sup>40</sup> *Id.* §§ 2907.03(A)(2), 2907.06(A)(2).

<sup>41</sup> *Id.* §§ 2907.03(A)(3), 2907.06(A)(3).

<sup>42</sup> *Id.* §§ 2907.03(A)(10), 2907.06(A)(5).



### III. VESTIGES OF CORROBORATION: OHIO’S SEXUAL IMPOSITION AND GROSS SEXUAL IMPOSITION STATUTES

Under traditional rape law, the corroboration requirement was a method of verifying a rape or sexual assault had taken place by insisting that evidence other than the victim’s statement needed to be introduced at trial. As one author explained: “Where corroboration was required, the prosecutor was forced to produce evidence other than the word of the rape victim to corroborate the victim’s testimony, establishing some or all of the essential elements of the case—identity of the accused, penetration, and nonconsent.”<sup>43</sup> Some legal commentators have noted the underlying rationale for the corroboration requirement was an intrinsic distrust of women and a “fear” of false accusations of rape.<sup>44</sup>

The Model Penal Code’s provision on corroboration is typical:

No person shall be convicted of any felony under this Article upon the uncorroborated testimony of the alleged victim. Corroboration may be circumstantial. In any prosecution before a jury for an offense under this Article, the jury shall be instructed to evaluate the testimony of a victim or complaining witness with special care in view of the emotional involvement of the witness and the difficulty of determining the truth with respect to alleged sexual activities carried out in private.<sup>45</sup>

Today, the corroboration requirement has *virtually* disappeared from the modern rape law. According to George Fisher, “No American jurisdiction retains a general corroboration requirement in rape cases. Georgia abolished the last remaining statutory rule in 1978 . . . and, Nebraska the last remaining common law rule in 1989.”<sup>46</sup> As recently as 2004, Michelle Anderson reported that Ohio is one of only three jurisdictions retaining the corroboration requirement in *any* of its sexual offense provisions.<sup>47</sup> Deborah Denno noted that even the drafters of the Model Penal

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<sup>43</sup> Cassia C. Spohn, *The Rape Reform Movement: The Traditional Common Law and Rape Law Reforms*, 39 JURIMETRICS J. 119, 125 (1999).

<sup>44</sup> *Id.* Matthew Hale’s cynical view of rape is amply illustrated in his negative statement that became a jury instruction. *See infra* note 133.

<sup>45</sup> MODEL PENAL CODE § 213.6(5) (1962). “Sometimes, what is called for is not so much independent evidence of particular elements of the offense, but rather merely a basis for believing that the testimony of the complaining witness is worthy of credit and belief.” *Id.* § 213.1(a), commentary at 430.

<sup>46</sup> George Fisher, *The Jury’s Rise as Lie Detector*, 107 YALE L.J. 575, 702 n.594 (1997) (“Several states still require corroboration in specific cases. *See, e.g.*, CAL. PENAL CODE § 262 (West 1997) (requiring corroboration in cases of spousal rape if the victim made no complaint to an official or counselor within one year); GA. CODE ANN. § 16-6-3 (1996) (requiring corroboration in statutory rape prosecutions); MISS. CODE ANN. § 97-3-69 (1996) (same); N.Y. PENAL LAW § 130.16 (McKinney 1987) (requiring corroboration when alleged lack of consent is due to mental defect or incapacity); TEX. CRIM. P. CODE ANN. § 38.07 (West 1995) (requiring corroboration when the victim made no complaint within one year of the assault, unless the victim was less than 18 years old).”).

<sup>47</sup> Michelle J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*, 84 B.U. L. REV. 945, 949-50 (2004) [hereinafter Anderson, *The Legacy*].

Code “acknowledged the controversy surrounding the rule in the 1970s and stressed that attitudes toward the doctrine were increasingly in a state of flux.”<sup>48</sup> Many legal scholars have credited feminist critiques of the corroboration requirement as being largely responsible for its demise. These critics emphasized that no other crime required the victim to meet special credibility standards,<sup>49</sup> that the corroboration requirement operated as a barrier to the successful prosecution of sexual offenses,<sup>50</sup> and, finally, that no empirical evidence existed to support the notion that women make a large number of false rape accusations (i.e., that “ladies lie”).<sup>51</sup>

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<sup>48</sup> Denno, *supra* note 1, at 214.

<sup>49</sup> Schulhofer, *supra* note 11, at 2171 (“At one time, the law of rape openly denied equality to women, for example, in rules that required special corroboration for rape complaints.”).

<sup>50</sup> According to Spohn:

Critics of the corroboration requirement claimed it was unnecessary and sexually discriminatory. They argued that the rule was unnecessary since judges and juries were “if anything, prejudiced against the complainant in a rape case.” Critics claimed that it was difficult to obtain corroborating evidence concerning an act that typically takes place in private without witnesses.

Spohn, *supra* note 43, at 125-26. Brownmiller concurs:

Since four out of five rapes go unreported, it is fair to say categorically that women do not find rape “an accusation easily to be made.” Those who do report their rape soon find, however, that it is indeed “hard to be proved.” . . . [The issue in rape cases] is based on the cherished male assumption that female persons tend to lie.

BROWNMILLER, *supra* note 11, at 369.

<sup>51</sup> Unfortunately, methodologically sound empirical data on the incidence of false allegations of rape are not readily available. In his article reviewing the existing studies, Philip N.S. Rumney summarizes the two major conclusions from empirical research on false rape accusations:

First, many of the studies of false allegations have adopted unreliable or untested research methodologies and, so we cannot discern with any degree of certainty the actual rate of false allegations. A key component in judging the reliability of research in this area relates to the criteria used to judge an allegation to be false. Some studies use entirely unreliable criteria, while others provide only limited information on how rates are measured. The second conclusion . . . is that the police continue to misapply the no-crime or unfounding criteria and in so doing it would appear that some officers have fixed views and expectations about how genuine rape victims should react to their victimisation. The qualitative research also suggests that some officers continue to exhibit an unjustified scepticism of rape complainants, while others interpret such things as lack of evidence or complaint withdrawal as “proof” of a false allegation. . . . However, the exact extent to which police officers incorrectly label allegations as false is difficult to discern.

Philip N.S. Rumney, *False Allegations of Rape*, 65 CAMBRIDGE L. J. 128, 142 (2006) (footnote omitted); see also David Lisak et al., *False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases*, 16 VIOLENCE AGAINST WOMEN 1318 (2010) (identifying only eight empirical studies using sound definitions and methodologies, with rates of false allegations ranging from 2.1% to 10.9%).

*A. Corroboration as a Bar to Prosecution under the Sexual Imposition Statute*

With two notable exceptions, Ohio has followed the national trend in American jurisdictions to eliminate the corroboration requirement in its sexual offenses.<sup>52</sup> The first exception is the sexual imposition statute, which punishes various forms of *sexual contact*, including when the victim’s ability to appraise her conduct is substantially impaired or the victim is unaware of the sexual contact. The statute contains a corroboration requirement: “No person shall be convicted of a violation of this section solely upon the victim’s testimony unsupported by other evidence.”<sup>53</sup> Thus, one of Ohio’s primary sexual offenses still requires corroboration before a prosecution may be brought.

Unlike other outmoded aspects of Ohio’s sexual offenses, the sexual imposition statute’s corroboration requirement has been the subject of relatively recent judicial treatment. In the 1996 case of *State v. Economo*,<sup>54</sup> the Supreme Court of Ohio was required to parse the meaning of the corroboration requirement and to consider its continued viability. The defendant was a doctor convicted of two counts of sexual imposition on a young woman patient.<sup>55</sup> The central witness in the prosecution’s case was the victim, who testified to the instances of sexual imposition—“specifically she claimed he massaged her breast and vaginal areas and, through his pants, he brushed his erect penis against her arm.”<sup>56</sup> The only other witness was the victim’s sister, who testified that she had accompanied the victim to the doctor’s office because the victim was upset about the doctor touching her.<sup>57</sup> The sister was not present in the examination room where the sexual contact occurred, but she did observe her sister leave the exam room on the verge of tears.<sup>58</sup> Thus, the only corroboration was the victim’s statements to her sister and the sister’s observation of the victim leaving the examination room.

At trial, the defendant claimed the case should have been dismissed because the state had failed to produce corroborating evidence as required by the sexual imposition statute.<sup>59</sup> The trial court overruled defendant’s objection, and the jury

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<sup>52</sup> See, e.g., MICH. COMP. LAWS § 750.520h (2010) (“The testimony of a victim need not be corroborated.”); MINN. STAT. § 609.341 Subd. 4(c) (2010) (“Corroboration of the victim’s testimony is not required to show lack of consent.”); NEB. REV. STAT. § 29-2028 (2010) (“The testimony of a person who is a victim of a sexual assault as defined in sections 28-319 to 28-320.01 shall not require corroboration.”); N.M. STAT. ANN. § 30-9-15 (2010) (“The testimony of a victim need not be corroborated in prosecutions under Sections 2 through 5 of this act and such testimony shall be entitled to the same weight as the testimony of victims of other crimes under the Criminal Code.”); S.C. CODE ANN. § 16-3-657 (2009) (“The testimony of the victim need not be corroborated in prosecutions under §§ 16-3-652 through 16-3-658.”); WYO. STAT. ANN. § 6-2-311 (2010) (“Corroboration of a victim’s testimony is not necessary to obtain a conviction for sexual assault.”).

<sup>53</sup> OHIO REV. CODE ANN. § 2907.06(B) (West 2006).

<sup>54</sup> *State v. Economo*, 666 N.E.2d 225 (Ohio 1996).

<sup>55</sup> *Id.* at 226.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 227.

convicted him.<sup>60</sup> The appellate court reversed the conviction.<sup>61</sup> The Ohio Supreme Court reinstated the conviction, holding that sufficient corroboration existed to allow the case to go to the jury;<sup>62</sup> it was then up to the jury to determine whether the government had proven its case beyond a reasonable doubt. The majority of the Court declined to abolish the corroboration requirement in the sexual imposition statute, feeling bound by the language enacted by the Ohio legislature.<sup>63</sup> “We therefore reject this proposition of law and do not strike down the corroboration requirement, even though we agree that it represents *waning attitudes toward victims of sexual offenses*.”<sup>64</sup> The Court held that the corroboration requirement did not mandate the introduction of evidence sufficient to convict the defendant (i.e., meet the burden of persuasion), but only enough evidence to support the victim’s testimony, and the Court found that sufficient evidence existed in *Economo*.<sup>65</sup>

In her concurring opinion, Justice Alice Robie Resnick argued that a corroboration requirement is unnecessary in the context of the crime of sexual imposition.<sup>66</sup> She quoted at length from the dissenting opinion of Judge Donald Nugent in the Ohio Court of Appeals, who also suggested that corroboration was unnecessary:

Moreover, elimination of the corroboration requirement hardly leaves defendants unprotected against unjust convictions. The defendant is entitled to all of the established safeguards of our criminal justice system, e.g., the presumption of innocence, the right not to incriminate oneself, the right to the effective assistance of counsel, etc. In addition, it is the trial judge’s responsibility to charge the jury as to the government’s burden of proving all essential elements of the offense beyond a reasonable doubt. Finally, protection against unjust convictions on a case-by-case basis is afforded defendants by the general rule that judgments of acquittal or reversals of conviction must be granted where sufficient evidence does not exist to support a guilty verdict, whether or not independent corroboration is technically present. . . . Given those safeguards, which are adequate in virtually every other type of prosecution, . . . , I have no reluctance in advocating the abolishment of the corroboration requirement of R.C. 2907.06 and leaving to the trial court, whose paramount obligation is always to see that justice is done, the initial responsibility of ensuring that a conviction for sexual imposition is based on sufficient evidence.<sup>67</sup>

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<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 229.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* (emphasis added).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 230-31 (Resnick, J., concurring).

<sup>67</sup> *Id.* at 231 (quoting *State v. Economo*, No. 66408, 1994 WL 693485, at \*6 (Ohio Ct. App. Dec. 8, 1994) (Nugent, J., dissenting)).

Justice Resnick urged the Ohio General Assembly to eliminate the corroboration requirement.<sup>68</sup>

In his dissent in *Economio*, Justice Mark Painter criticized the majority for essentially eliminating the corroboration requirement by watering it down to such a great extent that “it is difficult to imagine a case where the legislature’s enactment would be viable.”<sup>69</sup> He reasoned that because the corroboration requirement was still in effect in the sexual imposition statute, the statute should be strictly interpreted in the defendant’s favor—an invocation of the rule of lenity.<sup>70</sup> According to Justice Painter, the Ohio Supreme Court should have dismissed the case against *Economio* because the corroboration requirement had not been satisfied.<sup>71</sup> He wrote: “Because the majority decision changes the statutory law by judicial fiat, I respectfully dissent.”<sup>72</sup>

### 1. Critique of the Sexual Imposition Statute

The corroboration requirement in Ohio’s sexual imposition statute appears to be a last vestige from a time in American rape jurisprudence that corroboration was an important hallmark of rape law and suspicion of rape victims was rampant. Matthew Hale’s cynical view of rape affected American rape law for centuries.<sup>73</sup> The rape reform movements of the 1950s and 1970s did much to dismantle the substantive and procedural obstacles to the prosecution of rape cases. In particular, the resistance and corroboration requirements were substantially altered during these reform phases.<sup>74</sup> Like an organ that is no longer required for the proper functioning of the human body, the corroboration requirement in Ohio’s sexual imposition statute has outlived its usefulness and may pose a barrier to the successful prosecution of

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<sup>68</sup> To date, the Ohio General Assembly has not responded to Justice Resnick’s suggestion.

<sup>69</sup> *Economio*, 666 N.E.2d at 232 (Painter, J., dissenting) (“We must follow the law as written by the legislature, whether we like it or not. The majority decision in effect removes this section from the books.”).

<sup>70</sup> According to the U.S. Supreme Court, “ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.” *Rewis v. United States*, 401 U.S. 808, 812 (1971); see also OHIO REV. CODE ANN. § 2901.04(A) (West 2006) (“Except as otherwise provided in division (C) or (D) of this section, sections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused.”).

<sup>71</sup> For several other cases interpreting the corroboration requirement of the sexual imposition statute, see: *State v. Menke*, No. CA2002-01-021, 2003 Ohio App. LEXIS 83 (Ohio Ct. App. Jan. 13, 2003); *State v. Paluga*, No. CA2002-02-041, 2002 Ohio App. LEXIS 6673 (Ohio Ct. App. Dec. 16, 2002); *City of Akron v. Myers*, No. 20743, 2002 Ohio App. LEXIS 1049 (Ohio Ct. App. Mar. 13, 2002).

<sup>72</sup> *Economio*, 666 N.E.2d at 232 (Painter, J., dissenting). As Joshua Dressler notes, the rule of lenity “support[s] the principle of legality by preventing a court from inadvertently enlarging the scope of a criminal statute through its interpretive powers.” JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 48 (6th ed. 2012). Justice Painter’s argument is important in preserving the balance between legislative and judicial authority.

<sup>73</sup> HALE, *supra* note 2, at 633-35.

<sup>74</sup> See, e.g., Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777, 799 (1988).

offenders. Without the Ohio Supreme Court's very liberal interpretation of corroboration, the case in *Economo* would have been dismissed.

The Ohio legislature's failure to eliminate the corroboration requirement in the sexual imposition provision goes against the vast majority of American jurisdictions that have eliminated the corroboration requirement. Ohio is one of only three states that still retains the corroboration requirement in any form in its sexual offense provisions. No data exists to suggest that victims of sexual imposition are more likely than victims of other crimes to be unreliable or prone to fabricate charges against innocent persons.<sup>75</sup>

## 2. Suggested Statutory Reform

Following the suggestion of some members of the Ohio Supreme Court, the General Assembly should abolish the corroboration requirement in the sexual imposition statute. This reform would be extremely easy. The legislature could delete the language in the sexual imposition statute requiring corroboration (i.e., "No person shall be convicted of a violation of this section solely upon the victim's testimony unsupported by other evidence."<sup>76</sup>) Deletion of this requirement would equalize the proof needed for all Ohio sexual offenses. It would allow Ohio to join the other American jurisdictions that have eliminated all vestiges of this requirement. Finally, it would complete a reform that began years earlier to rid the Ohio sexual offenses of explicit distrust of rape victims and clearly communicate to victims of sexual offenses that they are worthy of belief.

Alternatively, the legislature could explicitly eliminate the corroboration requirement in all sexual offenses. For instance, the legislature in Nebraska enacted this provision: "The testimony of a person who is a victim of a sexual assault as defined in §§ 28-319 to 28-320.01 shall not require corroboration."<sup>77</sup> An even stronger lifting of the corroboration requirement may be found in Pennsylvania:

The credibility of a complainant of an offense under this chapter shall be determined by the same standard as is the credibility of a complainant of any other crime. The testimony of a complainant need not be corroborated in prosecutions under this chapter. No instructions shall be given cautioning the jury to view the complainant's testimony in any other way than that in which all complainants' testimony is viewed.<sup>78</sup>

Thus, Ohio legislators could follow Pennsylvania's lead by enacting a provision that eliminates corroboration and also equates the credibility of victims of sexual offenses with the credibility of other crime victims.

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<sup>75</sup> See *supra* note 52.

<sup>76</sup> OHIO REV. CODE ANN. § 2907.06(B) (West 2006).

<sup>77</sup> NEB. REV. STAT. § 29-2028 (2010) (entitled "Sexual assault; testimony; corroboration not required").

<sup>78</sup> 18 PA. CONS. STAT. § 3106 (2010); see also MINN. STAT. § 609.347 (2009) ("In a prosecution under sections 609.342 to 609.3451; 609.3453; or Minnesota Statutes 2004, section 609.109, the testimony of a victim need not be corroborated.").

*B. Corroboration as a Grading Criterion in the Gross Sexual Imposition Statute*

The corroboration requirement also appears in Ohio’s gross sexual imposition statute, which punishes *sexual contact* in more serious circumstances than the sexual imposition statute (e.g., when the touching occurs by force or after the defendant drugs the victim.) The gross sexual imposition statute contains a grading provision pertaining to when the victim of the sexual contact is less than thirteen years old or when the victim is under twelve.<sup>79</sup> The grading provision requires the court to impose a mandatory prison term equal to a term prescribed for a felony in the third degree<sup>80</sup> under Ohio Revised Code § 2929.14 if either of the following circumstances applies:

- (a) Evidence other than the testimony of the victim was admitted in the case *corroborating* the violation;
- (b) The offender previously was convicted of or pleaded guilty to a violation of this section, rape, the former offense of felonious sexual penetration, or sexual battery, and the victim of the previous offense was less than thirteen years of age.<sup>81</sup>

Thus, gross sexual imposition will be graded as a more serious felony, with a longer period of incarceration, if corroboration is present or the defendant had a previous conviction for a sexual offense against a victim less than thirteen years old.

1. Critique of the Gross Sexual Imposition Statute

At first glance, use of corroboration as a grading determinant in Ohio’s gross sexual imposition statute to elevate a fourth-degree felony to a third-degree felony seems slightly less objectionable because at least the prosecution is not barred by the absence of corroboration. The prosecution may still proceed against the alleged sexual offender without other evidence. However, upon closer scrutiny, it is not at all clear that a case in which corroboration exists should be punished more severely than a case with no corroboration. In all cases resulting in conviction, those with corroboration and those without, the jury must find the defendant guilty by the same burden of proof—beyond a reasonable doubt. If a jury is convinced by that quantum of proof, then it should be legally irrelevant whether corroboration exists, just as it would be legally irrelevant whether the case involved fingerprint, DNA, or other forms of evidence. As the Ohio Supreme Court commented in *Economo* about the corroboration requirement in the sexual imposition statute, “The corroboration

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<sup>79</sup> OHIO REV. CODE ANN. § 2907.05 (West 2006).

<sup>80</sup> Other sections of the gross sexual imposition statute are determined to be felonies of the fourth degree. *Id.* § 2907.05(C)(1).

<sup>81</sup> *Id.* § 2907.05(C)(2) (emphasis added) (“(2) Gross sexual imposition committed in violation of division (A)(4) or (B) of this section is a felony of the third degree. Except as otherwise provided in this division, for gross sexual imposition committed in violation of division (A)(4) or (B) of this section there is a presumption that a prison term shall be imposed for the offense. The court shall impose on an offender convicted of gross sexual imposition in violation of division (A)(4) or (B) of this section a mandatory prison term equal to one of the prison terms prescribed in section 2929.14 of the Revised Code for a felony of the third degree if either of the following applies: . . .”).

requirement . . . is a threshold inquiry of legal sufficiency to be determined by the trial court and is not a question of proof for the factfinder.”<sup>82</sup> Yet, its use as a grading criterion in the gross sexual imposition statute seems to contradict this holding, imposing a more severe penalty on those whose conduct is corroborated.

Moreover, the existence of corroboration does not bear on the question of moral blameworthiness, the predominant consideration in grading or sentencing decisions.<sup>83</sup> Consider the second grading criterion in the gross sexual imposition statute: whether the defendant was previously convicted of a sexual offense against a very young victim.<sup>84</sup> Many modern sentencing schemes, including the Federal Sentencing Guidelines, consider the offender’s criminal history in meting out the appropriate punishment.<sup>85</sup> Under the individual deterrence rationale for criminal punishment, a recidivist offender should receive a greater punishment to discourage him from reoffending.<sup>86</sup> But in the corroboration situation, the criminal actor’s conduct (and prior criminal history) is exactly the same whether corroboration exists or not. To put it another way, why is the defendant more morally blameworthy when corroboration exists? The obvious explanation for corroboration as a grading factor is a tacit re-emergence of the notion that rape victims are not to be trusted, and we truly believe them only when corroboration exists. When corroboration exists, so the argument might go, we can be confident enough that gross sexual imposition occurred and that a harsher penalty should be imposed. In this way, the grading provision is as problematic as the elemental corroboration requirement in the sexual imposition statute.

## 2. Suggested Statutory Reform

Ohio legislators should eliminate the grading subsection concerning corroboration in the gross sexual imposition statute by deleting this language: “Evidence other than the testimony of the victim was admitted in the case corroborating the violation; . . .”<sup>87</sup> The underlying rationale that a defendant is more worthy of punishment or is more deserving of a lengthier term of incarceration because of the existence of corroboration should be rejected. The defendant’s moral blameworthiness needs to be disaggregated from questions about the victim’s trustworthiness. No change needs to be made concerning the section regarding the offender’s criminal history—an appropriate grading consideration. By deleting the corroboration grading determinant, Ohio legislators can fully extinguish the tacit

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<sup>82</sup> *State v. Economo*, 666 N.E.2d 225, 228 (Ohio 1996).

<sup>83</sup> Sanford H. Kadish, *Why Substantive Criminal Law—A Dialogue*, 29 CLEV. ST. L. REV. 1, 10 (1980) (“It is deeply rooted in our moral sense of fitness that punishment entails blame, and that therefore, punishment may not justly be imposed where the person is not blameworthy.”).

<sup>84</sup> OHIO REV. CODE ANN. § 2907.05(C)(2) (West 2006).

<sup>85</sup> KATHLEEN F. BRICKEY, *CORPORATE AND WHITE COLLAR CRIME: CASES AND MATERIALS* (5th ed. 2011).

<sup>86</sup> DRESSLER, *supra* note 72, at 15 (discussing individual deterrence as a goal of punishment); *see also* LAFAYE, *supra* note 4, at 29-30 (discussing deterrence as a goal of criminal punishment).

<sup>87</sup> OHIO REV. CODE ANN. § 2907.05(C)(2)(a) (West 2006).



assumption that cases involving corroboration are worthy of greater punishment because the victim is more credible. The circumstance of whether the victim was corroborated is simply irrelevant to the defendant’s moral culpability.

#### IV. VESTIGES OF RESISTANCE: OHIO’S RAPE, SEXUAL BATTERY, GROSS SEXUAL IMPOSITION, AND SEXUAL IMPOSITION STATUTES

Under early versions of rape law, the victim of a sexual assault was required to resist her assailant to the utmost, an exceptionally difficult standard to meet.<sup>88</sup> Usually, this required use of her full physical powers to defeat her attacker<sup>89</sup> and physical resistance continuing without interruption.<sup>90</sup> Over time, most American jurisdictions softened the requirement so that resistance to the utmost was no longer required, but retained the requirement that the rape victim demonstrate some amount of resistance.<sup>91</sup> Feminist critiques of rape law further eroded the importance of the resistance requirement by arguing that sometimes resistance by the victim would result in greater injury or possibly death.<sup>92</sup> As Vivian Berger observed: “With respect to resistance, male lawmakers realize at last what every woman always knew: Fighting back is extremely risky—‘purity’ may exact too high a price.”<sup>93</sup>

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<sup>88</sup> LAFAVE, *supra* note 4, at 914-15; Spohn, *supra* note 43, at 119-20.

<sup>89</sup> LAFAVE, *supra* note 4, at 914-15; HALE, *supra* note 2, at 633. Hale writes:

The party ravished may give evidence upon oath, and is in law a competent witness, but the credibility of her testimony, and how far forth she is to be believed, must be left to the jury, and is more or less credible according to the circumstances of fact, that concur in that testimony.

For instance, if the witness be of good fame, if she presently discovered the offense and made pursuit after the offender, showed circumstances and signs of the injury, whereof many are of that nature, that only women are the most proper examiners and inspectors, if the place, wherein the fact was done, was remote from people, inhabitants or passengers, if the offender fled for it; these and the like are concurring evidences to give greater probability to her testimony, when proved by others as well as herself.

But on the other side, if she concealed the injury for any considerable time after she had opportunity to complain, if the place, where the fact was supposed to be committed, were near to inhabitants or common recourse or passage of passengers, and she made no outcry when the fact was supposed to be done, when and where it is probable she might be heard by others; these and the like circumstances carry a strong presumption, that her testimony is false or feigned.

*Id.*

<sup>90</sup> LAFAVE, *supra* note 4, at 914-15.

<sup>91</sup> *Id.*

<sup>92</sup> See *In re M.T.S.*, 609 A.2d 1266, 1272 (N.J. 1992); Spohn, *supra* note 43; MODEL PENAL CODE COMMENTARIES § 305-06 (“First, resistance may prove an invitation to danger of death or serious bodily harm. Second, it is wrong to excuse the male assailant on the ground that his victim failed to protect herself with a dedication and intensity that a court might expect of a reasonable person in her situation.”).

<sup>93</sup> Berger, *supra* note 8, at 11.

A vast majority of states have eliminated resistance language from their rape statutes.<sup>94</sup> Some jurisdictions have also explicitly stated that resistance is not required.<sup>95</sup> For instance, Illinois's statute provides:

It shall be a defense to any offense . . . where force or threat of force is an element of the offense that the victim consented. "Consent" means a freely given agreement to the act of sexual penetration or sexual conduct in question. Lack of verbal or physical resistance or submission by the victim resulting from the use of force or threat of force by the accused shall not constitute consent.<sup>96</sup>

Commentators have debated whether the explicit elimination of the resistance requirement has merely pushed the question of resistance underground such that juries still consider evidence of resistance in determining whether the offender is guilty of rape.<sup>97</sup> Contemporary discussions of the resistance requirement usually center on the issue of whether verbal resistance is sufficient.<sup>98</sup> Ohio's treatment of the resistance requirement in its sexual offense provisions raises several problems.

*A. The Language of the Provisions Eliminating Resistance in the Rape and Gross Sexual Imposition Statutes*

Following the trend among American jurisdictions to abolish the resistance requirement, two of Ohio's four sexual offense provisions—rape and gross sexual imposition—explicitly eliminate the need for physical resistance by the victim.<sup>99</sup> In

<sup>94</sup> LaFave reports that thirty states have no resistance language in their rape statutes and that six states explicitly provide that physical resistance is no longer required, although he cautions that resistance may still play a tacit role in some jurisdictions. See LAFAVE, *supra* note 4, at 915; Michelle J. Anderson, *Reviving Resistance in Rape Law*, 1998 U. ILL. L. REV. 953 [hereinafter Anderson, *Reviving Resistance*]; Timothy W. Murphy, *A Matter of Force: The Redefinition of Rape*, 39 A.F. L. REV. 19, 20 (1996) (citing MODEL PENAL CODE COMMENTARIES pt. II (1980)).

<sup>95</sup> Anderson, *Reviving Resistance*, *supra* note 94, at 966-67.

<sup>96</sup> 720 ILL. COMP. STAT. ANN. 5/12-17 (West 2011); Berger, *supra* note 8, at 12 ("The overall purpose of these reforms is to treat rape more like other offenses. A major motif is that rape prosecutions should concentrate on the *defendant's* conduct, inquiring into the actions of the complaining witness only when fairness so requires.").

<sup>97</sup> DRESSLER, *supra* note 72, at 581 ("But, even as courts and legislatures abolish or soften the resistance rule, a female's resistance—or lack thereof—has not lost its potential relevance in rape prosecutions. That is, although substantial resistance may no longer be necessary to prove rape (and in a few jurisdictions, none is required), proof of resistance may be helpful—or even critical—to the fact finder's determination that a rape has occurred."); MODEL PENAL CODE COMMENTARIES § 305-06 ("As a practical matter, juries may require resistance to show that the male compelled her to submit, but there is little reason to encase this generalization in a rule of law. Where the proof establishes that the actor did compel submission to intercourse by force, the failure of a weak or fearful victim to display 'utmost' or even 'earnest' resistance should not be exculpatory.").

<sup>98</sup> LAFAVE, *supra* note 4, at 915-16.

<sup>99</sup> The status of the resistance requirement in Ohio's sexual offenses is complex and multifaceted, much like its treatment of the marital exemption. See, e.g., Patricia J. Falk, *The Three Marital Exemptions in Ohio's Rape Statute*, 88 LAW & FACT 24 (2007).

fact, Ohio was one of the first states to eliminate the resistance requirement.<sup>100</sup> The rape statute, prohibiting *sexual conduct* (i.e., sexual intercourse, oral sex, and penetration) under a set of enumerated circumstances, provides: "A victim need not prove physical resistance to the offender in prosecutions under this section."<sup>101</sup> The gross sexual imposition statute, covering instances of *sexual contact* (i.e., touching of the erogenous zones) under a similar set of circumstances, uses the identical language to eliminate resistance.<sup>102</sup>

### 1. Critique of the Statutory Language

The explicit elimination of physical resistance from the rape and gross sexual imposition statutes is salutary because these abolish a potential impediment to rape prosecutions. The language of the resistance-elimination provisions, however, is legally inaccurate and may be confusing. The provision begins with the phrase "A victim need not prove . . ."<sup>103</sup> However, rape victims are not parties to criminal prosecutions, and concomitantly they bear no evidentiary burden in court.<sup>104</sup> Rather, the government is required to prove that the defendant committed the crime beyond a reasonable doubt.<sup>105</sup> In making such proof, the government is not required to prove that the victim physically resisted.<sup>106</sup> As one Ohio appellate court accurately interpreted the rape statute: "Pursuant to R.C. 2907.02(C), the State is not required to prove resistance by the victim in a rape case."<sup>107</sup>

The wording of the resistance-elimination provisions is not a matter of mere semantics. The current formulation of these provisions unfortunately evokes the time when victims were essentially put on trial<sup>108</sup> rather than the defendant. This language continues to inaccurately communicate that the victim is required, or not required, to prove something in a rape case perpetuates the focus on the victim rather than on the alleged offender.<sup>109</sup> If courts base model jury instructions on this statutory language,

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<sup>100</sup> Berger, *supra* note 8, at 11, 11 n.79.

<sup>101</sup> OHIO REV. CODE ANN. § 2907.02(C) (West 2006).

<sup>102</sup> *Id.* § 2907.05(D).

<sup>103</sup> *Id.* § 2907.02(C).

<sup>104</sup> In articulating the difference between the criminal and civil systems, LaFave comments: "With crimes, the state itself brings criminal proceedings to protect the public interest but not to compensate the victim; with torts, the injured party himself institutes proceedings to recover damages (or perhaps to enjoin the defendant from causing further damage)." LAFAVE, *supra* note 4, at 16 (footnotes omitted).

<sup>105</sup> *Id.* at 58, 71-72.

<sup>106</sup> *State v. Varner*, No. 98CA00016, 1998 Ohio App. LEXIS 4707 (Ohio Ct. App. Sept. 14, 1998).

<sup>107</sup> *Id.*

<sup>108</sup> As the court in *M.T.S.* wrote in discussing the resistance requirement: "That the law put the rape victim on trial was clear." *In re M.T.S.*, 609 A.2d 1266, 1272 (N.J. 1992); *see also The Legal Bias Against Rape Victims*, 61 A.B.A.J. 464 (1975) ("Distrust of the complainant's credibility [had] led to an exaggerated insistence on evidence of resistance.").

<sup>109</sup> Drafters of the Model Penal Code were also worried that too much emphasis was placed on the victim in a rape case and not enough on the offender. The MPC Commentary explains:

juries may be confused as to how to assess the evidence in a rape or gross sexual imposition case.

## 2. Suggested Statutory Reform

The language in Ohio's rape and gross sexual imposition statutes regarding the elimination of the resistance requirement should be slightly modified to more clearly indicate that victims bear no burden of proof in criminal prosecutions. Instead of reading "A victim need not prove physical resistance . . .,"<sup>110</sup> the language should state: "The government need not prove that the victim physically resisted the offender in prosecutions under this section." Or, as one court put it, "the State is not required to prove resistance by the victim in a rape case."<sup>111</sup> These alternate formulations clearly and unequivocally communicate that the physical resistance requirement is not placed on either the victim or the prosecution in a rape case. Moreover, they ensure that no confusion exists regarding the identity of the parties to the criminal case. Finally, they help to focus attention on the conduct of the criminal actor rather than on the victim.

### *B. The Continued Viability of the Resistance Requirement, or the Absence of Language Eliminating Resistance, in the Sexual Battery and Sexual Imposition Statutes*

A very tangible vestige of the resistance requirement exists in Ohio sexual offenses because only the rape and gross sexual imposition statutes contain language eliminating the physical resistance requirement. Neither of the other two major offenses—sexual battery or sexual imposition—contain the provision eliminating the need for physical resistance by the victim.

#### 1. Critique of the Absence of Language Eliminating the Physical Resistance Requirement in Sexual Battery and Sexual Imposition

The absence of the resistance-lifting language from the sexual battery and sexual imposition statutes raises serious concerns. Does this mean that the state must prove that the victims of these offenses physically resisted their attackers? If the victims do not physically resist their attackers, will the cases against those criminal actors be

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By focusing upon the actor who "compels" the victim "to submit by force" and by omitting express language of consent and resistance, the Model Penal Code casts away encrusted precedent and strikes a fresh approach. This is not to say that consent by the victim is irrelevant or that inquiry into the level of resistance by the victim cannot or should not be made. Compulsion plainly implies non-consent, just as resistance is evidence of non-consent. By the same token, the lack of resistance on a particular occasion will not preclude a conviction of rape if the jury can be convinced by the context and the degree of force employed by the actor that the submission was by compulsion.

American Law Institute, Model Penal Code and Commentaries, Comment to § 213.1, at 306-07 (1980).

<sup>110</sup> OHIO REV. CODE ANN. § 2907.05(D) (West 2006).

<sup>111</sup> State v. Varner, No. 98CA00016, 1998 Ohio App. LEXIS 4707 (Ohio Ct. App. Sept. 14, 1998).

jeopardized? Under the basic rules of statutory construction,<sup>112</sup> a criminal defendant might argue that physical resistance is still required by the victim in sexual battery and sexual imposition cases because two of Ohio’s other sexual offenses explicitly eliminate the need for physical resistance by the victim. The Ohio legislature must have intended to retain the resistance requirement in the sexual battery and sexual imposition offenses, a defendant might argue, because it demonstrated the ability to eliminate the requirement in the other provisions.<sup>113</sup> In other words, the selective lifting of the resistance requirement in some statutes represents a tacit inclusion of the requirement in similar statutes.

The absence of a provision eliminating resistance from sexual battery and sexual imposition is problematic for all the reasons that the resistance requirement was finally abolished in most American jurisdictions—namely because it represents an unwarranted obstacle in a case for convicting an otherwise guilty defendant. The possibility that resistance should be eliminated when it comes to some, but not all, sexual offenses does not make sense. For instance, returning to *Economo*—the sexual imposition case—the victim might have been paralyzed with fear when she was inappropriately touched and fondled by her doctor.<sup>114</sup> It seems unfair for the law to require a victim under these circumstances to demonstrate physical resistance. Her attacker, a doctor, is unprivileged in touching her in a sexual way. What relevance would her resistance have in that context? Similarly, the prosecution should not have to prove that the victim in a sexual battery prosecution of her mental health professional physically resisted her attacker.<sup>115</sup> Both the sexual battery and the sexual imposition statutes cover circumstances in which the victim is substantially incapacitated<sup>116</sup> or unaware of the sexual conduct.<sup>117</sup> How could physical resistance

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<sup>112</sup> See, e.g., *Marx v. Gen. Revenue Corp.*, 133 S. Ct. 1166, 1178 (2013); see also *Boise Cascade Corp. v. Envtl. Prot. Agency*, 942 F.2d 1427, 1432 (9th Cir.1991) (“Under accepted canons of statutory interpretation, we must interpret statutes as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous.”); Russell Holder, *Say What You Mean and Mean What You Say: The Resurrection of Plain Meaning in California Courts*, 30 U.C. DAVIS L. REV. 569 (1997) (“The textualists place great emphasis on the use of canons of statutory construction as part of the careful reading of a statute, armed with logic and a good dictionary. A good example of a textual canon is the maxim *inclusio unius est exclusio alterius* (the inclusion of one thing implies the exclusion of the rest). Justice Scalia used this maxim in *Chan v. Korean Airlines* to evaluate a statutory provision lacking an express negation of limits on liability for failure to notify. Because other sections of the statute provided such a remedy, he reasoned, Congress intended to deny a remedy in this instance.” (footnotes omitted)).

<sup>113</sup> “[I]t is well settled that to determine the intent of the General Assembly ‘it is the duty of this court to give effect to the words used [in a statute], not to delete words used or to insert words not used.’” *State v. Dirmyer*, No. 13-13-24, 2014 WL 858794, at ¶ 26 (Ohio Ct. App. Mar. 3, 2014).

<sup>114</sup> *State v. Economo*, 666 N.E.2d 225 (Ohio 1996).

<sup>115</sup> “The offender is a mental health professional, the other person is a mental health client or patient of the offender, and the offender induces the other person to submit by falsely representing to the other person that the sexual conduct is necessary for mental health treatment purposes.” OHIO REV. CODE ANN. § 2907.03(A)(10) (West 2006). A similar provision appears in the sexual imposition statute. *Id.* § 2907.06(A)(5).

<sup>116</sup> *Id.* §§ 2907.03(A)(2), 2907.06(A)(2).

be expected under these circumstances? To the contrary, it is precisely this type of case that underscores the fact that physical resistance by the victim is not required.<sup>118</sup>

## 2. Suggested Statutory Reform

The Ohio legislature should explicitly eliminate the resistance requirement from all the primary sexual offenses, specifically the crimes of sexual battery and sexual imposition. The same provision that appears in the rape and gross sexual imposition statutes (but slightly amended as discussed in the previous section) should also be included in the remaining two provisions: “The government need not prove that the victim physically resisted the offender in prosecutions under this section.”<sup>119</sup> The addition of this explicit statutory elimination of the resistance requirement in the sexual battery and sexual imposition statutes will extinguish any ambiguity about whether resistance is still required for these two offenses. In this way, the legislature will foreclose any statutory construction arguments by criminal defendants that a resistance requirement still survives in Ohio’s major sexual offense provisions. Moreover, these changes will harmonize all of Ohio’s sexual offense provisions, and bring Ohio in line with the national trend to abolish physical resistance.

### *C. Resistance Language Appearing in the Incapacitation, Anti-Drugging, and Coercion Provisions of the Rape, Gross Sexual Imposition, and Sexual Battery Statutes*

Although Ohio’s rape and gross sexual imposition statutes have explicitly eliminated the resistance requirement, these same criminal statutes contain other substantive provisions utilizing resistance language without embodying a resistance requirement *per se*.<sup>120</sup> For instance, one provision in Ohio’s rape statute concerning sexual conduct with an impaired person reads:

The other person’s ability *to resist* or consent is substantially impaired because of a mental or physical condition or because of advanced age,<sup>121</sup> and the offender knows or has reasonable cause to believe that the other

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<sup>117</sup> *Id.* §§ 2907.03(A)(3), 2907.06(A)(3).

<sup>118</sup> Even the husband impersonation statute in the sexual battery provision would seem to make resistance irrelevant. *Id.* § 2907.03(A)(4).

<sup>119</sup> *Id.* § 2907.02(C) (language modified).

<sup>120</sup> John F. Decker & Peter G. Baroni, “No” Still Means “Yes”: The Failure of the “Non-Consent” Reform Movement in American Rape and Sexual Assault Law, 101 J. CRIM. L. & CRIMINOLOGY 1081 (2011) (noting that 16 states do not require resistance but have provisions with resistance language like “unable to resist” or “prevented from resisting”).

<sup>121</sup> The reference to advanced age as a circumstance meriting special treatment of the victim is relatively unique among American jurisdictions. *See, e.g.*, TEX. PENAL CODE § 22.021 (2004) (aggravated sexual assault statute referring to elderly person); 720 ILL. COMP. STAT. ANN. 5/12-14 (LexisNexis 2004) (aggravated criminal sexual assault statute providing the victim was 60 years or over when the offense was committed). This appears to be a salutary aspect of Ohio’s statute because of the growing number of persons in the American population of advanced age and the likeliness of those persons being subject to sexual assault of various kinds.

person’s ability to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age.<sup>122</sup>

A second section of the rape statute, outlawing the administration of a drug or intoxicant as a prelude to sexual conduct, states: “For the purpose of *preventing resistance*, the offender substantially impairs the other person’s judgment or control by administering any drug, intoxicant, or controlled substance to the other person surreptitiously or by force, threat of force, or deception.”<sup>123</sup> The gross sexual imposition statute contains two parallel provisions with the same resistance language.<sup>124</sup>

Finally, language relating to resistance appears in a third Ohio offense—sexual battery. This statute, which does not contain language eliminating the need for the victim to physically resist her attacker,<sup>125</sup> contains the following alternative: “The offender knowingly coerces the other person to submit by any means that would *prevent resistance* by a person of ordinary resolution.”<sup>126</sup>

Thus, although Ohio’s rape and gross sexual imposition statutes eliminate the need for physical resistance, resistance appears to be an important explicit consideration in these two sexual offenses—and also the sexual battery statute—as a means of measuring the degree of overpowering the defendant employed against his victim. The question becomes whether these statutory references to resistance in the substantive sexual assault provisions are inconsistent with the provisions eliminating the need of the government to prove physical resistance by the victim.

#### 1. Critique of Using Resistance Language to Describe Impairment of Victim’s Ability to Consent

The existence of resistance language in modern sexual offense provisions dealing with substantial incapacitation due to mental or physical condition or to the administration of intoxicants is quite confusing when other provisions of these same statutes provide that resistance is not required by the victim. Ohio’s facially inconsistent approach to the resistance requirement is not unique. Courts in several other jurisdictions have confronted internal inconsistencies in their sexual offense provisions of the same nature as those currently confronting Ohio.

In *People v. Giardino*,<sup>127</sup> for example, a California case involving the resistance requirement in a drugging case, the jury requested further guidance on the meaning

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<sup>122</sup> OHIO REV. CODE ANN. § 2907.02(A)(c) (West 2006) (rape) (emphasis added); *Id.* § 2907.05(A)(5) (gross sexual imposition with slightly different language not relevant here).

<sup>123</sup> *Id.* § 2907.02(A)(1)(a) (rape) (emphasis added); *Id.* § 2907.05(A)(2) (gross sexual imposition with slight variation in language not relevant to this discussion).

<sup>124</sup> *Id.* § 2907.05(A)(2) (“For the purpose of preventing resistance, the offender substantially impairs the judgment or control of the other person . . . by administering any drug, . . .”); *Id.* § 2907.05(A)(5) (“The ability of the other person to resist or consent . . . is substantially impaired because of a mental or physical condition or because of advanced age . . . and the offender knows or has reasonable cause to believe that the ability to resist or consent . . . is substantially impaired . . .”).

<sup>125</sup> See *supra* notes 117-24 and accompanying text.

<sup>126</sup> OHIO REV. CODE ANN. § 2907.03(A)(1) (West 2006) (emphasis added).

<sup>127</sup> *People v. Giardino*, 98 Cal. Rptr. 2d 315 (Ct. App. 2000); see also *People v. Salazar*, 193 Cal. Rptr. 1 (Ct. App. 1983); *People v. Leon*, 2012 WL 3570395 (Cal. Ct. App.) (“On the

of resistance in California's rape statute.<sup>128</sup> The appellate court noted that normally jury instructions that track the statutory language are sufficient unless the jury would have difficulty applying them, but the court determined that an additional instruction was required in *Giardino* because the meaning of the phrase "preventing resistance" was not clear.<sup>129</sup> In explaining that resistance did not refer to physical resistance, but rather the victim's ability to exercise judgment, the court held that the jury should have been instructed that "as a result of her level of intoxication, the victim lacked the legal capacity to give 'consent' as that term is defined in § 261.6."<sup>130</sup> The appellate court added: "We are sympathetic to the quandary in which the trial court was placed. Its reluctance to vary from the statutory language or the standard jury instructions is understandable, particularly in light of the absence of any prior case law directly interpreting the phrase at issue."<sup>131</sup> One could argue the California appellate court rewrote the rape statute, changing the issue from resistance to consent in an effort to clarify and modernize California law.

Similarly, in *Elliott v. State*,<sup>132</sup> the Texas Court of Criminal Appeals had to decipher the meaning of "physically unable to resist" in the state's sexual assault statute.<sup>133</sup> Reviewing the history of the resistance requirement in Texas rape law, the court concluded that "the notion that the amount of compulsion necessary to constitute sexual assault should be measured by the degree of resistance to be expected under the circumstances was dropped from the statutory scheme."<sup>134</sup> Like *Giardino*, the *Elliot* court interpreted the relevant resistance provision in terms of consent, holding "that where assent in fact has not been given, and the actor knows that the victim's physical impairment is such that resistance is not reasonably to be expected, sexual intercourse is 'without consent' under the sexual assault statute."<sup>135</sup> Thus, the Texas court found that resistance language misdirects the inquiry of

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merits, we disagree with defendant's criticism of *Giardino*. There have been no cases criticizing or contravening *Giardino* in the 12 years that have passed since *Giardino* was decided. To the contrary, the Court of Appeal has recently cited this specific language in *Giardino* with approval. See *People v. Smith*, 191 Cal. App. 4th 199, 204-05 (2010).")

<sup>128</sup> See CAL. PENAL CODE § 261(a)(3) (West 2001).

<sup>129</sup> See *Giardino*, 98 Cal. Rptr. 2d at 324.

<sup>130</sup> *Id.* California law defines consent as "positive cooperation in act or attitude pursuant to the exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved." CAL PENAL CODE § 261.6 (West 2014).

<sup>131</sup> *Id.* at 325.

<sup>132</sup> *Elliot v. State*, 858 S.W.2d 478, 485 (Tex. Crim. App. 1993); *Anderson v. State*, No. 02-10-00489-CR, 2012 WL 1222148, at \*1 (Tex. App. Apr. 12, 2012) ("When assent in fact has not been given, and the actor knows that the victim's physical impairment is such that resistance is not reasonably to be expected, sexual intercourse is "without consent" under the sexual assault statute.").

<sup>133</sup> *Elliot*, 858 S.W.2d at 485.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*; see also *Horowitz v. State*, No. 01-93-01022-CR, 1996 Tex. App. LEXIS 1080, at \*22-23 (Tex. App. Mar. 7, 1996) (affirming the standard).



interest: The question is not whether a victim resisted but whether she or he consented.<sup>136</sup>

Finally, in *Commonwealth v. Berkowitz*, the court struggled with the tension between one provision in the rape statute stating resistance was not required and another provision outlawing the use of a "threat of forcible compulsion that would prevent resistance by a person of reasonable resolution."<sup>137</sup> This language is quite similar to Ohio's sexual battery provision. The court wrote: "Although the 'no resistance requirement' does not, on its face, in any way restrict the situations to which it may apply, it appears that the statute must have limits."<sup>138</sup> Then, the court commented that if the "no resistance requirement" applied to the threat section of the rape statute, "the description of the type of threat which is sufficient would be rendered wholly meaningless."<sup>139</sup> The court reconciled the two provisions as follows:

To be consistent, therefore, the "no resistance requirement" must be applied only to prevent any *adverse inference* to be drawn against the person who, *while* being "forcibly compelled" to engage in intercourse, chooses not to physically resist. Since there is no evidence that the instant victim was at any time "forcibly compelled" to engage in sexual intercourse, our conclusion is not at odds with the "no resistance requirement."<sup>140</sup>

As I have argued elsewhere,<sup>141</sup> the use of resistance language in provisions concerning the use of drugs to disable victims or in terms of describing a victim's incapacitation is confusing to juries and deflects attention from the real question in these cases: Was the victim capable of giving meaningful consent to the sexual act on the occasion in question?<sup>142</sup> Thus, it would be preferable to include explicit statutory language clarifying that the inquiry is really not about resistance but about the victim's ability to give meaningful consent to the sexual conduct or contact.<sup>143</sup> A legislative enactment is superior to a judicial interpretation as in the previous cases,

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<sup>136</sup> *Elliot*, 858 S.W.2d at 485. As one dissenting judge wrote in the famous case of *Rusk v. State*, 406 A.2d 624 (Md. Ct. Spec. App. 1979), *rev'd* 424 A.2d 720 (Md. 1981): "Thus it is that the focus is almost entirely on the extent of resistance—the victim's acts, rather than those of her assailant. Attention is directed not to the wrongful stimulus, but to the victim's reactions to it." *Id.* at 629 (Wilner, J., dissenting).

<sup>137</sup> *Commonwealth v. Berkowitz*, 609 A.2d 1338, at 1348 n.7 (Pa. Super. Ct. 1992).

<sup>138</sup> *Id.*; *cf.* OHIO REV. CODE ANN. § 2907.03(A)(1) (West 2014) (emphasis added) ("The offender knowingly coerces the other person to submit by any means that would prevent resistance by a person of ordinary resolution.").

<sup>139</sup> *Berkowitz*, 609 A.2d at 1348 n.7.

<sup>140</sup> *Id.*

<sup>141</sup> See, e.g., Patricia J. Falk, *Rape by Drugs: A Statutory Overview and Proposals for Reform*, 44 ARIZ. L. REV. 131 (2002).

<sup>142</sup> *Id.* at 200.

<sup>143</sup> *Id.*

because criminal defendants can continue to challenge those judicial pronouncements,<sup>144</sup> and a legislative enactment preserves the principle of legality.<sup>145</sup>

## 2. Suggested Statutory Reform

The operative language of the rape and gross sexual imposition statutes should focus directly on consent because, after all, sexual offenses protect victims from unwanted, nonconsensual sexual activity. Turning first to the mental or physical incapacitation provisions in the rape and gross sexual imposition statutes, the resistance language is provided as an alternative to consent.<sup>146</sup> Thus, these statutory sections should be amended by deleting the phrase “resist and” and adding the phrase “to the sexual conduct[contact]” for greater overall clarity. The statute would then read:

The ability of the other person *to consent to the sexual conduct[contact]* or the ability of one of the other persons *to consent to the sexual conduct[contact]* is substantially impaired because of a mental or physical condition or because of advanced age, and the offender knows or has reasonable cause to believe that the ability *to consent to the sexual conduct[contact]* of the other person or of one of the other persons is substantially impaired because of a mental or physical condition or because of advanced age.

This amendment would more forthrightly emphasize the importance of consent in the context of rape and gross sexual imposition and help to clarify the relevant inquiry.

With respect to the general anti-drugging provisions of the rape and gross sexual imposition statutes, the legislature used only resistance language and did not provide an alternative based on consent.<sup>147</sup> However, these statutes should also focus directly on consent because of that requirement’s importance in all sexual offenses. It should read:

For the purpose of *preventing the exercise of reasoned/meaningful consent*, the offender substantially impairs the other person’s judgment or control by administering any drug, intoxicant, or controlled substance to the other person surreptitiously or by force, threat of force, or deception.

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<sup>144</sup> See, e.g., *People v. Leon*, No. B230034, 2012 WL 3570395 (Cal. Ct. App. Aug. 20, 2012).

<sup>145</sup> See, e.g., Paul Robinson describes the “principle of legality” as the proposition that “criminal liability and punishment can be based only upon a prior legislative enactment of a prohibition that is expressed with adequate precision and clarity.” Paul H. Robinson, *Fair Notice and Fair Adjudication: Two Kinds of Legality*, 154 U. PA. L. REV. 335, 336 (2005).

<sup>146</sup> “The other person’s ability *to resist or consent* is substantially impaired . . . .” OHIO REV. CODE ANN. § 2907.02(A)(c) (West 2006) (rape) (emphasis added); *Id.* § 2907.05(A)(5) (gross sexual imposition with slightly different language not relevant here).

<sup>147</sup> “For the purpose of *preventing resistance* . . . .” *Id.* § 2907.02(A)(1)(a) (rape) (emphasis added); *Id.* § 2907.05(A)(2) (gross sexual imposition with slight variation in language not relevant to this discussion).

This amendment to the general anti-drugging provisions will clearly communicate that it is the drug’s effect on the victim’s ability to consent that is important, not the victim’s ability to physically resist—something that the Ohio legislature has deemed to be legally irrelevant.

Similarly, the language of the sexual battery statute should be amended to delete the reference to resistance and reframe the critical question in terms of consent.<sup>148</sup> The provision might read as follows: “The offender knowingly coerces the other person to submit by any means that would *prevent the exercise of reasoned/meaningful consent* by a person of ordinary resolution.” In these three different provisions, the statutes’ descriptions of victim incapacitation, intoxication, or coercion should be written in terms of the inability of the victim to give informed or knowing consent to the sexual act rather than her inability to resist.

One final problem must be addressed. Under Ohio law, no definition of “consent” or “lack of consent” appears in the general definitional section for criminal offenses (i.e., a global consent provision)<sup>149</sup> or in the specific definitional section for sexual offenses.<sup>150</sup> In contrast, Ohio’s criminal fraud and theft chapter contains a provision entitled “Evidence of victim’s lack of capacity to give consent,” which reads:

In a prosecution for any alleged violation of a provision of this chapter, if the lack of consent of the victim is an element . . . , evidence that, at the time . . . , the victim lacked the capacity to give consent is admissible to show that the victim did not give consent.

As used in this section, “lacks the capacity to consent” means being impaired for any reason to the extent that the person lacks sufficient understanding or capacity to make and carry out reasonable decisions concerning the person or the person’s resources.<sup>151</sup>

Thus, Ohio law provides more guidance on the meaning of consent (or a lack thereof) when it comes to property crimes like theft and fraud than in the context of the sexual offenses. The omission of a definition of consent for sexual offenses should be remedied because of the importance of consent to rape law in general, and the references to consent in various provisions of the rape and gross sexual imposition statutes.

This omission could be remedied in one of two ways. First, some jurisdictions define consent for purposes of all of their criminal statutes, often employing language based on Model Penal Code 2.11, which provides:

[A]ssent does not constitute consent if: . . . (b) it is given by a person who by reason of youth, mental disease or defect or intoxication is manifestly

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<sup>148</sup> Minnesota defines mentally incapacitated as, *inter alia*, “lacks the judgment to give a reasoned consent to sexual contact or sexual penetration.” MINN. STAT. § 609.341(7) (2009) (in definition of mentally incapacitated).

<sup>149</sup> See Patricia J. Falk, *Rape by Fraud and Rape by Coercion*, 64 BROOK. L. REV. 39, 114 (1998) (discussing global consent provisions).

<sup>150</sup> OHIO REV. CODE ANN. § 2907.01 (West 2014).

<sup>151</sup> *Id.* § 2913.73.

unable or known by the actor to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct charged to constitute the offense . . . .<sup>152</sup>

Second, other jurisdictions define consent in terms of their sexual offense provisions. For example, California's statute reads: "'consent' shall be defined to mean positive cooperation in act or attitude pursuant to an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved."<sup>153</sup> Minnesota's tripartite formulation— withhold consent, withdraw it, or communicate nonconsent— is helpful because it emphasizes that consent is a continuing activity, not a one-time event.<sup>154</sup> The use of descriptive words such as reasoned, meaningful, informed, or knowing in characterizing the nature of the consent required in sexual assault cases is advisable to increase clarity and to provide more guidance to the prosecution, the defense, and the jury.

#### V. CONCLUSION

"[R]ape is a most detestable crime, . . . ; but it must be remembered, that it is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent."<sup>155</sup>

The marital rape exemption and the historical requirements in rape law of resistance, corroboration, and chastity continue to infect both statutory law and the way that actors with the criminal justice system—police, prosecutors, judges, and juries—see the crime of rape. Reforming each of these areas with an eye toward diminishing the legal impact of negative social attitudes toward [] rape victims is the next step in rape law reform.<sup>156</sup>

Vestiges of a by-gone era in which the victims of rape were subjected to special procedural and evidentiary obstacles—like the corroboration and resistance

<sup>152</sup> MODEL PENAL CODE § 2.11(3)(b) (1962).

<sup>153</sup> CAL. PENAL CODE § 261.6 (West 2014).

<sup>154</sup> MINN. STAT. § 609.341(9) (2010) ("'Physically helpless' means that a person is (a) asleep or not conscious, (b) unable to *withhold consent* or to *withdraw consent* because of a physical condition, or (c) unable to *communicate nonconsent* and the condition is known or reasonably should have been known to the actor." (emphasis added)).

<sup>155</sup> HALE, *supra* note 2, at 635. In his treatise, Hale follows this statement with two instances in which the victims of "rape" were found to have lied. Then, he comments:

I only mention these instances, that we may be the more cautious upon trials of offenses of this nature, wherein the court and jury may with so much ease be imposed upon without great care and vigilance; the heinousness of the offense many times transporting the judge and jury with so much indignation, that they are over-hastily carried to conviction of the person accused thereof by the confident testimony, sometimes of malicious and false witnesses.

*Id.* at 636. According to Anderson, these cautionary instructions are on the wane. Anderson, *The Legacy*, *supra* note 47. Fred Strebeigh reported that the California Supreme Court discovered the "long-neglected context" for Hale's instruction, namely that it pertained to cases involving girls under twelve years old and not those involving adult women. FRED STREBEIGH, EQUAL: WOMEN RESHAPE AMERICAN LAW 327 (2009).

<sup>156</sup> Anderson, *Diminishing*, *supra* note 14, at 645.

requirements—persist in modern statutory enactments despite the universal rejection of their rationale—“because ladies lie.” In fact, no empirical evidence exists that victims of rape are more likely to lie about their attacks than are any other victims of crime. Yet, rape reform will not be complete until these vestiges have been removed from jurisdictions’ sexual offense provisions. Removing them has practical and symbolic implications for the successful prosecution of sexual offenses.

The amendments proposed by this Article are modest in scope.<sup>157</sup> First, Ohio legislators should amend the sexual imposition and gross sexual imposition statutes to delete references to corroboration, completing the process started many years ago. Second, legislators should alter the wording of the provisions eliminating resistance in the rape and gross sexual imposition statutes to emphasize it is the government, not the victim, who bears no burden in proving resistance in a criminal case. Third, the resistance-elimination provision, in modified form, should be added to both the sexual battery and sexual imposition statutes to establish that physical resistance is also not required for these sexual offenses. Fourth, the substantial incapacitation and anti-drugging provisions in the rape and gross sexual impositions statutes, as well as the coercion provision in the sexual battery statute, should be reworded to emphasize lack of consent rather than resistance. Finally, the Ohio legislature should provide a definition of consent for use in applying the sexual offense provisions. These changes will add clarity to Ohio’s sexual offense provisions and modernize them by bringing them into the twenty first century, finally eliminating the vestiges of a basic distrust of sexual assault victims.

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<sup>157</sup> I leave for another day a more fundamental overhauling of Ohio’s sexual offense provisions.

## APPENDIX: EXCERPTS FROM OHIO'S CURRENT SEXUAL OFFENSE PROVISIONS

*A. The Corroboration Requirement in the Sexual Imposition Statute*

No person shall be convicted of a violation of this section solely upon the victim's testimony unsupported by other evidence.<sup>158</sup>

*B. Corroboration as a Grading Criterion in the Gross Sexual Imposition Statute*

Gross sexual imposition committed in violation of division (A)(4) or (B) of this section is a felony of the third degree. Except as otherwise provided in this division, for gross sexual imposition committed in violation of division (A)(4) or (B) of this section there is a presumption that a prison term shall be imposed for the offense. The court shall impose on an offender convicted of gross sexual imposition in violation of division (A)(4) or (B) of this section a mandatory prison term equal to one of the prison terms prescribed in § 2929.14 of the Revised Code for a felony of the third degree if either of the following applies:

(a) Evidence other than the testimony of the victim was admitted in the case corroborating the violation;

(b) The offender previously was convicted of or pleaded guilty to a violation of this section, rape, the former offense of felonious sexual penetration, or sexual battery, and the victim of the previous offense was less than thirteen years of age.<sup>159</sup>

*C. Language of the Resistance-Elimination Provisions in the Rape and Gross Sexual Imposition Statutes*

A victim need not prove physical resistance to the offender in prosecutions under this section.<sup>160</sup>

*D. Provisions Using Resistance Language in the Rape, Sexual Battery, and Gross Sexual Imposition Statutes*

For the purpose of preventing resistance, the offender substantially impairs the other person's judgment or control by administering any drug, intoxicant, or controlled substance to the other person surreptitiously or by force, threat of force, or deception.

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The other person's ability to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age, and the offender knows or has reasonable cause to believe that the other

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<sup>158</sup> OHIO REV. CODE ANN. § 2907.05(B)(2) (West 2006).

<sup>159</sup> *Id.* § 2907.05(B)(2).

<sup>160</sup> *Id.* §§ 2907.02(C) (rape), 2907.05(D) (gross sexual imposition).

person’s ability to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age.<sup>161</sup>

The offender knowingly coerces the other person to submit by any means that would prevent resistance by a person of ordinary resolution.<sup>162</sup>

For the purpose of preventing resistance, the offender substantially impairs the judgment or control of the other person or of one of the other persons by administering any drug, intoxicant, or controlled substance to the other person surreptitiously or by force, threat of force, or deception.

....

The ability of the other person to resist or consent or the ability of one of the other persons to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age, and the offender knows or has reasonable cause to believe that the ability to resist or consent of the other person or of one of the other persons is substantially impaired because of a mental or physical condition or because of advanced age.<sup>163</sup>

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<sup>161</sup> *Id.* §§ 2907.02(A)(1)(a), (c) (rape).

<sup>162</sup> *Id.* § 2907.03(A)(1) (sexual battery).

<sup>163</sup> *Id.* §§2907.05(A)(2), (5) (gross sexual imposition).